In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	
CONCRETE PRODUCTS, INC.	)	Adversary Proceeding
(Chapter 11 Case 88-20540)	)	
	)	Number 94-2023
Debtor	)	
	)	
	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY and THE HOME INSURANCE COMPANY	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
CONCRETE PRODUCTS, INC., J. B. EURELL COMPANY, NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION, and THE COUNTY OF CRAVEN, JERRY LAWRENCE GENERAL CONTRACTOR, INC., and STEPHENS & FRANCIS, P.A.	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER
ON MOTION TO DISMISS AND FOR ABSTENTION

Plaintiffs filed their Complaint for Declaratory Judgment on June 1, 1994. Defendants, New Bern-Craven County Board of Education and The County of Craven, filed a Motion to Dismiss and for Abstention on June 28, 1994. On August 4, 1994,

Defendant, Stephens & Francis, P.A., filed a motion seeking to join the Motion to Dismiss. After hearing oral arguments on the Motion at a Pre-Trial Hearing on August 19, 1994, I took the matter under advisement. Based upon the record in the file, the parties' arguments, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Defendant's Motion is brought pursuant to Bankruptcy Rule 7012(b)(1), which incorporates Rule 12(b)(1) of the Federal Rules of Civil Procedure. As a result, this Court in not restricted to the face of the pleadings in considering Defendant's Motion. "[W]hen considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), the . . . court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits, documents or testimony, to resolve factual disputes concerning the existence of jurisdiction." Walnut Assoc. v. Saidel, 164 B.R. 487, 490 (E.D.Pa. 1994) (*citing* McCarthy v. U.S., 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989)). *See also* 2A J. MOORE, FEDERAL PRACTICE, ¶ 12.07[2.-1], at 12-47 to 12-49. Accordingly, the following facts are taken from the record in the file of this adversary proceeding and the record in Debtor's underlying bankruptcy case.

Debtor, and Defendant herein, Concrete Products, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 3, 1988, and continued to operate its manufacturing business thereafter as a debtor in possession under section 1107 of the Code. On May 5, 1989, this court appointed a Chapter 11 Trustee to operate the business. The Trustee was subsequently excused from duty and Debtor has since ceased all business activity, although the case remains under Chapter 11. The case is now in a liquidation mode and is

nearing completion. No dividend is anticipated for unsecured creditors.

Plaintiffs provided comprehensive general liability insurance to CPI during different periods of its operations. Liberty Mutual Insurance Company ("Liberty Mutual"), provided coverage from December 31, 1985 to December 31, 1986, while The Home Insurance Company ("Home Insurance"), provided coverage from December 31, 1987, to December 31, 1988.

On September 7, 1990, Defendants, New-Bern County Board of Education ("Board") and Craven County of North Carolina ("County"), filed suit in the North Carolina General Court of Justice, Superior Court Division, against J.B. Eurell Company, Jerry Lawrence General Contractor, Inc., and Stephens & Francis, P.A. The suit alleges breach of contract negligence in the design and construction of two elementary schools in Craven County. On January 25, 1991, J. B. Eurell Company filed its Answer in the law suit, as well as a motion for leave to file a third-party complaint against Debtor. J. B. Eurell subsequently filed in this Court a motion for relief from the automatic stay imposed in Debtor's bankruptcy case to allow J. B. Eurell to bring Debtor into the North Carolina action. On September 18, 1991, this Court entered an Order lifting the automatic as follows:

> [T]he Court finds that J.B. Eurell Company has a valid claim for any liability insurance proceeds available under any insurance liability policy issued to the debtor and which may be applicable; that any such liability insurance policy is not essential to any plan of reorganization for the debtor; and that J.B. Eurell Company will suffer irreparable harm, loss and damage if not permitted to bring the debtor into a lawsuit filed against J.B. Eurell Company, file number 90 CVS 1276, in the County of Craven, State of North Carolina, without delay to the extent of any insurance coverage available to the debtor.

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the stay afforded by 11 U.S.C § 362 be, and is hereby modified to permit J.B. Eurell Company to bring the debtor into the lawsuit filed against it in the County of Craven, State of North Carolina, file number 90 CVS 1276, to the extent that the debtor had any applicable liability insurance in force and effect during the applicable time period. . .

On September 11, 1991, J. B. Eurell filed its third-party complaint against Debtor in the North Carolina Superior Court. Thereafter, the Board and the County amended their complaint asserting a cause of action directly against Debtor. In connection with this amendment, the Board and the County entered into a stipulation with Debtor which this Court entered as an Order in Debtor's case on August 28, 1992. The Order further modifies the automatic stay for the purpose of allowing the Board and the County to pursue their claims in the North Carolina Superior Court directly against Debtor under the following terms:

> 2. The Stay is modified and the previously issued order lifting the Stay amplified to the extent that the Plaintiff continues New Bern-Craven County Board of Education as plaintiff as well as J.B. Eurell as third party plaintiff continue the State Court Action against the Debtor so long as, (a) the Debtor remains covered by applicable insurance coverage, (b) the claim and ultimate relief awarded is within the limits of said insurance coverage provided by such insurance carrier to the Debtor, and (c) such insurance carrier for the Debtor defends said claim.
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> 3. *Plaintiffs waive all claims (as defined in 11 U.S.C. § 101(5)) against the Debtor and its estate in excess of the limits of said insurance policies and agree to look solely to said insurance policies for the satisfaction of their claims.* (emphasis added)

The suit still pends in the North Carolina Superior Court, however, no damages have been awarded or liability assessed. In the interim, on March 25, 1994, the

Board and the County filed a separate action in the same North Carolina court seeking a judgment declaring that Liberty Mutual and Home Insurance were liable under their respective liability policies for any damages awarded against Debtor in the North Carolina law suit. The Board and the County did not seek an order from this Court lifting the automatic stay with regard to this particular action. Approximately two months later, on June 4, 1994, Liberty Mutual and Home Insurance initiated this proceeding seeking a declaratory judgment from this Court that they were not liable under their respective comprehensive general liability insurance policies for any damages assessed against Debtor in the North Carolina litigation.

Defendants contend in their Motion and in oral argument that this adversary proceeding has absolutely no relation or nexus to Debtor's Chapter 11 case, and as a result, this Court should either dismiss the proceeding for lack of jurisdiction or abstain from hearing the matter in the interests of justice and comity with state law. Defendants further contend that Plaintiffs are "forum shopping" in an effort to obtain a favorable ruling. In support of these contentions, Defendants point out that this court has already granted relief from stay with respect to this litigation against Debtor under a stipulation that limits the recovery against Debtor to the extent of any insurance coverage, that an action for declaratory judgment on the exact same issue was already pending in North Carolina when Plaintiffs initiated this proceeding, and that this court has previously ruled in favor of Home Insurance in a different adversary proceeding associated with this case involving almost identical issues.

Plaintiffs assert in opposition to the motion that Defendants failed to obtain relief from the automatic stay with respect to the declaratory judgment action pending in North Carolina, and that, under North Carolina law, Defendants' declaratory judgment action there is not ripe for decision because no final judgment has been obtained in the underlying

litigation. Therefore, Defendants contend that they are not "forum shopping", this proceeding is properly before the court, and the factors considered by other courts do not indicate that this is a proper case for abstention.

CONCLUSIONS OF LAW

A federal court, in ruling upon a motion to dismiss for lack of subject matter jurisdiction, presumptively lacks such jurisdiction unless it is affirmatively established by the party alleging jurisdiction.[1] Accordingly, Plaintiffs bear the burden of persuasion on this issue.[2]

Plaintiffs' allegation of jurisdiction in their Complaint rests solely upon the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.[3] This provision, in relevant part, provides:

> In a case of actual controversy within its jurisdiction . . . *any court of the United States*, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interest party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added). There are two things to note about this provision. The

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[1] *See e.g.*, Walnut Assoc. v. Saidel, 164 B.R. 487, 490 (E.D. Pa. 1994).

[2] In re Chargit, Inc., 81 B.R. 243, 247-48 (Bankr. S.D.N.Y. 1987);

[3] Plaintiffs also cite 11 U.S.C. § 362 and Bankruptcy Rule 7001, however, there is no question that neither of these provisions provide this court with subject matter jurisdiction. Such jurisdiction must, as developed below, be established under, and only under, 28 U.S.C. 1334.

first is that, although a bankruptcy court may enter a declaratory judgments in a matter properly before it, section 2201 has been held to be inapplicable to bankruptcy courts because bankruptcy courts are not "courts of the United States" as defined in 28 U.S.C. § 451.[4] The second is that, regardless of whether it applies to bankruptcy courts, section 2201 does not create federal subject matter jurisdiction where such jurisdiction does not already exist.[5] Thus, 28 U.S.C. § 2201 is not a proper basis for jurisdiction over this matter.

Subject matter jurisdiction over bankruptcy matters is conferred to district courts by 28 U.S.C. § 1334. This provision sets out four categories of matters over which the district court exercises jurisdiction:

> (1) All cases under title 11;
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> (2) All civil proceedings arising under title 11;
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> (3) All civil proceedings arising in cases under title 11;
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> (4) All civil proceedings related to cases under title 11.

28 U.S.C. §§ 1334(a) and (b). The first category, "all cases under title 11," refers to the original bankruptcy petition itself.[6] Clearly, the instant proceeding does not fall within this category of jurisdiction.

The second category, "proceedings arising under title 11," refers to matters

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[4] *See* Matter of Korhumel Industries, Inc., 103 B.R. 917, 920-21 (N.D.Ill. 1989)

[5] *See e.g.*, Ellis v. Cassidy, 625 F.2d 227, 229 (9th Cir. 1980) (*citing* Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952)); Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345, 351 (3rd Cir. 1986).

[6] *See* In re James Edward Cady, Jr. (Rentrak Corp. v. JAMES EDWARD CADY, JR. v. WILLIE EUGENE SAPP, ET. AL.), Adv. Pro. No. 93-05024, Ch. 7 No. 93-50258, slip op. at 5 (1994 WL 329 371) (Bankr. S.D.Ga. March 11, 1994) (Walker, B.J.) (*citing* Matter of Wood, 825 F.2d 90, 92 (5th Cir. 1987)).

which rely upon a cause of action either created or determined by a provision of title 11, such as a trustee's action to avoid a preference.[7] The third category, "proceedings arising in cases under title 11", covers those administrative matters which, although not based on any right expressly created by title 11, nonetheless would not exist outside of bankruptcy.[8] Such matters would include the filing of a proof of claim or an objection to discharge.[9] The final category of jurisdiction, those proceedings that are "related to" a case under title 11, is by far the broadest in scope and the most difficult in practice to apply. "The test to determine if a proceeding is 'related to' a case under title 11 is if the outcome of the proceeding could conceivably have an effect on the administration of the bankruptcy estate."[10] "The proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."[11] This category of jurisdiction is not without limits, however. "Although the optimist may argue that anything is 'conceivable,' any practical definition of this term of art must be tempered by a measure of reasonableness."[12]

Because these final three categories of jurisdiction operate conjunctively to give the district court subject matter jurisdiction over any civil proceeding which either arises under, arises in, or is related to, the underlying bankruptcy case, it is unnecessary to fit a

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[7] Matter of Wood, 825 F.2d at 96-97.

[8] Id. at 97.

[9] James Edward Cady, Jr., *supra*, at 6.

[10] In re James Edward Cady, Jr., *supra*, slip op. at 6 (*citing* In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990).

[11] In re Lemco Gypsum, Inc., 910 F.2d at 788.

[12] In re Chargit, Inc., 81 B.R. 243, 247-48 (Bankr. S.D.N.Y. 1987).

proceeding within any one of these three categories. A determination need only be made that the proceeding is at least "related to" the under bankruptcy case.[13] For the reasons that follow, I conclude that this proceeding is not "related to" Debtor's bankruptcy and as a result, subject matter jurisdiction is lacking.

The outcome of this proceeding can have no conceivable effect upon the administration of Debtor's bankruptcy estate because Debtor is not exposed to any liability in the North Carolina litigation. The Board and the County expressly waived, in the order lifting the automatic stay, any claims arising from the North Carolina litigation that are outside the scope of Debtors' coverage under the Home and Liberty Mutual insurance policies. Thus, it does not matter, from Debtor's perspective, whether Liberty Mutual and Home are ultimately determined to be liable under the policies or not because the Board and the County have waived all other claims against Debtor. Furthermore, there appear to be no assets in Debtor's estate from which any claim by the Board or County could be satisfied. Hence, even in the absence of the waiver of claims, the outcome of this proceeding would have no effect upon Debtor's estate because any claim which the Board, the County, or any other litigant in the North Carolina action, might assert against the estate will be just another general unsecured claim that will likely receive nothing upon distribution of Debtor's assets.

In sum, Debtor has absolutely no economic stake in the outcome of the North Carolina litigation and is completely unaffected by the resolution of this proceeding. Debtor is little more than a nominal party in this litigation, necessary under state law as the named insured in the policies, but without any actual pecuniary interest in its outcome. In light of this, as well as the fact that the automatic stay was long ago lifted to allow this litigation to

[13] In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991); Walnut Associates v. Saidel, 164 B.R. 487, 491 (E.D. Pa. 1994); Searcy v. Knotsman, 155 B.R. 699, 703 (S.D. Miss. 1993);

proceed in state court, I conclude that the outcome of this proceeding could not conceivably have any effect upon Debtor's bankruptcy estate. I therefore find that this court does not have "related to" jurisdiction under section 1334(b) over this proceeding, and, accordingly, Defendants' Motion to Dismiss will be granted.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion to Dismiss of Defendants, New Bern-Craven County Board of Education and The County of Craven, is hereby GRANTED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of September, 1994.